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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

817.

SUPERINTENDENT FIVE CIVILIZED TRIBES, FOR SANDY FOX, CREEK NO. 1263, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR PETITIONER.

It is the position of the Respondent that exemption from Federal income taxes can only exist in this case by virtue of an agreement creating a vested right of non-taxability. Such a right he insists is present here only insofar as Sandy Fox's homestead is concerned, qualified to the extent that it is doubtful if this right would extend to the income produced from the homestead. (Br. 12, 13.) This position is

predicated on the language embodied in the Original and Supplemental Creek Agreements, which agreements, for purposes of Federal taxation, were reviewed by the Attorney General in 34 Ops. A. G. 275, published as Treasury Decision 3750 (cumulative Bulletin III-1, p. 85). This opinion of the Attorney General also considered the Act of April 26, 1906, 34 Stat. 137. Footnote No. 7 (Resp. Br. p. 26) states:

> "We think the Treasury has made too much of the Act of [April 26,] 1906."

The agreements with the Cherokees, the Choctaws, the Chickasaws, the Creeks and the Seminoles show a lack of uniformity in the various documents. The Atoka agreement with the Choctaws and Chickasaws provided in part that all allotted lands should be non-taxable so long as the title remained in the original allottee but not to exceed twenty-one years from date of patent. The Original and Supplemental Creek Agreements provided that the 40 acre homestead alone should be non-taxable for twenty-one years from deed of patent. These promises of non-taxability are indicative of the attitude and policy of Congress towards its wards.

However the real interest of Congress was not the tribe to which the particular allottee belonged, but his quantum of Indian blood. This is evident from the Act of April 21, 1904, 33 Stat. 189, 204, whereby restrictions, on the property of the various allottees of the Five Civilized Tribes who were not of Indian blood, were removed. In 1906, or shortly thereafter, restrictions on most of the lands of the allottees of the Five Civilized Tribes were about to expire by limitation. With this in mind Congress enacted the Act of April 26, 1906, c. 1876, 34 Stat. 137, which provides in its caption:

> "An Act To Provide For The Final Disposition Of The Affairs Of The Five Civilized Tribes In The Indian Territory, And For Other Purposes."

This Act deals with the tribes as a group. By section 19 thereof, Congress retained restrictions as to alienation on the allotments of all full-blood Indians of these various tribes and further provided:

> "That all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottee."

Respecting the Act of April 26, 1906, the Respondent contends that it is merely an Act of Congress and not an agreement. The Original and Supplemental Creek Agreements were also Acts of Congress, Act of March 1, 1901, 31 Stat. 861, and Act of June 30, 1902, 32 Stat. 500, respectively. Although the Act of April 26, 1906, unlike the earlier Acts, did not provide for ratification by the tribes, it was in fact ratified and approved by the Creek Tribe of which Sandy Fox is a full-blood member. This ratification does not appear in the transcript of record, nor was it presented at the trial of the case below. We embody a copy of it here for any purpose it may be competent to serve:

> "Resolved by the National Council of the Muskogee (Creek) Nation, in extra session assembled; that Section nineteen (19) of the Act of Congress of the United States approved April 26th, 1906, (Public No. 129), which reads as follows:
>
> 'That no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes shall have power to alienate, sell, dispose of or encumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this Act, unless such restrictions shall, prior to the expiration of said period be removed by Act of Congress; and for all purposes the quantum of Indian blood possessed by any member of said tribe shall be determined by the rolls of citizens of said tribes approved by the Secretary of the Interior; Provided, however, That such full-blood Indians of any of said tribes may lease any lands other than homesteads for

more than one year under such rules and regulations as may be prescribed by the Secretary of the Interior; and in case of the inability of any full-blood owner of a homestead, on account of infirmity or age, to work or farm his homestead, the Secretary of the Interior, upon proof of such inability, may authorize the leasing of such homestead under such rules and regulations: Provided further, That conveyances heretofore made by members of any of the Five Civilized Tribes subsequent to the selection of allotment and subsequent to removal of restrictions, where patents thereafter issue, shall not be deemed or held invalid solely because said conveyances were made prior to issuance and recording or delivery of patent or deed; but this shall not be held or construed as affecting the validify orinvalidity of any such conveyance, except as hereinabove provided; and every deed executed before the removal of restrictions, be and the same is hereby declared void; Provided further, That all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottee.'

is hereby ratified, confirmed and approved.

"Be it further resolved that Section twenty-two (22) of the Act of Congress of the United States, approved April 26th, 1906, (Public No. 129) which reads as follows:

'That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States Court for the Indian Territory. And in case of the organization of a state or territory, then by a proper Court of the county in which said minor or minors may reside or in which said real estate is situated, upon an order of

such Court made upon petition filed by guardian. All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe.'

is hereby adopted, ratified and confirmed.

"Be it further resolved that Section twenty-three (23) of the Act of Congress of the United States, approved April 26th, 1906, (Public No. 129), which reads as follows:

'Every person of lawful age and sound mind may by last will and testament devise and bequeath all of his estate, real and personal, and all interest therein: Provided, That no will of a full-blood Indian devising real estate shall be valid, if such last will and testament disinherits the parent, wife, spouse, or children of such full-blood Indian, unless acknowledged before and approved by a Judge of the United States Court for the Indian Territory, or a United States Commissioner.'

August 2nd, 1907.

DAVID ANDERSON,
Pres. House of Kings, Pro Tem.

SAM. GRAYSON,
Clerk.

Concurred in August 2nd, 1907.

ALEX DAVIS,
Speaker House of Warriors.

MILDRED CHILDERS,
Clerk.

Approved August 3rd, 1907.

P. PORTER,
Principal Chief.

THE WHITE HOUSE,

Washington, September 17, 1907.

APPROVED:

T. ROOSEVELT.

I hereby certify that I am the officer having custody of the records pertaining to the Acts and Resolutions passed by the National Council of the Creek Nation and that the above and foregoing is a true and correct copy of a Resolution passed by said Council August 2, 1907, approved by the Principal Chief of the Creek Nation August 3, 1907, and by the President September 17, 1907, ratifying and confirming Sections 19, 22 and 23 of the Act of Congress approved April 26, 1906.

THOS. RYAN,
Acting Commissioner to the Five Civilized Tribes.

Muskogee, Okla., Feb. 28, 1910."

The above resolution was copied from the records of this Court in case No. 60, October Term 1910, *Tiger* v. *Western Investment Co.*, and appears at page 70 of Brief of Plaintiff in Error filed in that case on March 12, 1910. At page 310 of 221 U. S., this Court in deciding *Tiger* v. *Western Investment Co.* referred to this ratification as follows:

"• • • it is stated without contradiction that the Act of 1906 has been ratified by the council of that [Creek] Nation."

Thus the Creek Tribe of Indians, at least, considered the Act of April 26, 1906, as a further agreement as evidenced by their ratification. That the Federal Government considered this Act as an agreement is evidenced by Senate Report No. 982, 70th Cong. 1st Sess., accompanying the Act of May 10, 1928, 45 Stat. 495. This report embodies a letter from the Secretary of the Interior which reviews the agreements with the Five Tribes including the Act of April 26, 1906, and states (p. 2):

"• • • These *agreements*, set forth in the above-mentioned acts of Congress • • • also contained provisions relating to the nontaxability, for certain periods of time, of the allotments or parts of allotments." (Italics supplied)

We further feel that the exemption from taxation embodied in section 19 of this Act was supported by a consideration, if any was needed. As to the full-blood Creek Indians, restrictions on alienation of their surplus lands would expire by lapse of time in 1907, and Congress in retaining control of their affairs until April 26, 1931, gave to them an exemption from taxation as long as the title to their allotments remained in the original allottees.

The Respondent contends (Br. 13):

> "They made no agreement respecting the government's right later to levy an income tax."

This contention, it is submitted was rejected in principle by this Court in the recent case of *Carpenter* v. *Shaw*, 280 U. S. 363. In that case restrictions had been removed by the Act of May 27, 1908, 35 Stat. 312, from the allotments of Choctaw Indians. These allotments had been leased for the production of oil and gas with a reserved royalty to the Indian and the State of Oklahoma asserted a tax upon this royalty interest to the extent of 3 per cent of its value. This Court in denying the tax stated (p. 367):

> "* * * we think the provisions that 'the lands allotted shall be non-taxable while the title remains in the allottees' cannot be taken to be restricted only to those taxes commonly known as land or real estate taxes, but must be deemed at least to embrace a tax assessed against the allottees with respect to a legal interest in their allotment less than the whole."

Respondent also states (Br. 26):

> "The source of the income here is not the taxpayer's original allotted lands."

In *United States* v. *Brown*, 8 F. (2d) 564, certiorari denied 270 U. S. 644, and in the numerous cases reviewed therein, it is well recognized and established that the income from an allotment is merely a change in form; that this income is in fact a part of the allotment, and that the same

conditions exist respecting it as exists with the allotted lands.

In summation the conclusion to be drawn from the Original and Supplemental Creek Agreements together with the Act of April 26, 1906, *supra*, is that the income here in question is either in fact or by liberal construction of the Acts of Congress income from this full-blood Indian's allotment and that by the Act of April 26, 1906, it is exempted from taxation. A holding by this Court to this effect would be sufficient for the purposes of this case, for the refund sought herein is protected, even under the provisions of the Revenue Act of 1928, sec. 507, 45 Stat. 791, amending sec. 284 (c) of the Revenue Act of 1926, by the filing of the petition before the Board of Tax Appeals.

But petitioner's position that his income is non taxable is founded on a broader principle than that of a vested right of tax exemption. Such a vested right may exist as to certain income, but if in fact this income is reported for purposes of Federal taxation, the tax paid thereon will not be refunded until a condition precedent has been complied with, namely, the filing of a proper claim for refund within the applicable statutory period. This rule has been applied to members of the Choctaw Tribe of Indians to whom a vested right of tax exemption exists by virtue of the Atoka Agreement. *United States* v. *Richards*, (C. C. A. 8) 27 F. (2d) 284, certiorari denied 278 U. S. 630. There it was conceded that Federal income taxes had been erroneously and illegally assessed and collected on royalties paid to him on oil produced from lands allotted to him. Restrictions had been removed from his lands by the Act of May 27, 1908, *supra*, and the Court stated at page 286 of 27 F. (2d):

> "At the times the assessments and payments were made he had full charge and control of the allotment and the income therefrom. * * * He was charged with notice that there was a special and exclusive remedy provided for the recovery of a tax that had been erroneously and illegally assessed and collected. He attempted to avail himself of that remedy without com-

plying with precedent conditions on which it rested.

> On the facts set up we think plaintiff's claim cannot be granted as of legal right."

As to Restricted Indians, however, this rule of construction is inapplicable. They are not amenable to the Federal income statutes, and such is the holding of the Attorney General, the Treasury Department, and the courts. 34 Ops. A. G. 302, Treasury Decision 3754, Cumulative Bulletin IV-2, p. 37, *Blackbird* v. *Commissioner*, 38 F. (2d) 976, reversing 14 B. T. A. 1247. And none of these decisions are predicated upon any agreement granting a vested right of tax exemption. To the contrary no such agreement existed between the Federal Government and the Restricted Quapaw Indians, Treasury Decision 3754, *supra*; or between the Federal Government and the Restricted Osage Indians, *Blackbird* v. *Commissioner*, *supra*. In 35 Ops. A. G. 107, 108, the Attorney General held that the Federal income tax laws did not apply to the income of a full-blood, unallotted, Hopi Indian. The income there under consideration arose partly from the increase of sheep and cattle, partly from a trading post conducted by the Indian, and partly from a stage line for conducting tourists over the Hopi Reservation. This opinion of the Attorney General is on all fours and is in direct conflict with S. M. 4527, Cumulative Bulletin IV-2, p. 29, relied upon by the Respondent (Br. 24) to support the views of the Treasury Department since 1925. It will be noted that S. M. 4527 and the other rulings relied upon by Respondent in his brief are rulings of the Bureau of Internal Revenue and *not* Treasury Decisions. The only Treasury Decisions in point are T. D. 3750, *supra*, and T. D. 3754, *supra*, and they both support the position of petitioner here. Any doubt that may have existed as to the effect of 34 Ops. A. G. 275, published as T. D. 3750 was removed by the further opinion of the Attorney General in 34 Ops. A. G. 302. It was there stated (p. 305):

> "Moreover, inasmuch as *the income tax statutes do not apply to the class of Indians under discussion*, I see no reason why the limitations clauses therein contained relative to claims for refund or abatements should be invoked against them." (Italics supplied)

The Respondent takes the further position (Br. 27) that the income here in question is taxable by implied Congressional approval of his position here, and in support thereof, he cites S. J. Res. 167, passed February 14, 1933 (No. 53, 72nd Cong. 1st Sess.). The purpose of this resolution (Senate Report No. 830, 72nd Cong. 1st Sess.) was to give to unrestricted Indians a year from the passage of the Act in which to file claims for refund for interest where interest was not included in the prior claim for refund of taxes. The resolution granted relief as to interest to those unrestricted Indians affected by the ruling in *United States* v. *Richards*, 27 F. (2d) 284. Congress had previously granted a year in which to file claims for refund for the taxes erroneously paid, but barred from recovery under the rule laid down in *United States* v. *Richards*, *supra*. Public Resolution No. 74, 71st Cong. (S. J. 163), approved May 19, 1930, *infra* p. 12.

S. J. Res. 167 obviously refers to refunds made more than six years prior to February 14, 1933, for interest on any refunds subsequent to February 14, 1927, would have been protected without further legislation from Congress. *Colgate-Palmolive-Peet Co.* v. *United States*, 58 F. (2d) 499, *Leisering et al.* v. *United States*, 3 Fed. Supp. 853. The six-year limitation for filing suit to recover interest is provided for in Section 156 of the Judicial Code (36 Stat. 1139), which provides in part:

> "Every claim against the United States cognizable by the Court of Claims, shall be forever barred unless the petition setting forth a statement thereof is filed in the court, or transmitted to it by the Secretary of the Senate or the Clerk of the House of Representatives, as provided by law, within six years after the claim first accrues."

Further there is no limitation for filing refund claims by Indians with Petitioner's status, and such is the ruling in S. M. 5632, Cumulative Bulletin V-I, pages 193, 198, as follows:

> "* * * the only tax which may be refunded without reference to the various statutes of limitations is (1) a tax which was assessed against the non-taxable income of an Indian and (2) which has been paid by an Indian superintendent, or other such officer of the United States, out of funds in his possession belonging eventually to his ward."

Thus the only logical inference to be drawn from S. J. Res. 167 is that Congress was granting a year in which to file a claim for refund to those Indians who received refunds prior to February 14, 1927, and whose status required the filing of a refund claim.

It seems to us to be improbable and inconsistent to construe a Joint Resolution of Congress, the purpose of which is admittedly that of relief to Unrestricted Indians, as a declaration by Congress of its approbation of a tax asserted against its Restricted wards upon a highly technical basis. To the contrary we feel that Congress in enacting identical language in subsequent Revenue laws was content with the construction placed upon such language by the Attorney General, by the Treasury Department in its Treasury Decisions, and by the courts. These decisions hold that the Federal Revenue Laws are inapplicable to the Indian wards of the Government with the status of Sandy Fox.

Accordingly the decision below should be reversed.

Respectfully submitted,

THOMAS J. REILLY,
F. M. GOODWIN,
ARTHUR F. MULLEN,
GEORGE F. SHEA,
Attorneys for Petitioner.

May 4, 1935.

APPENDIX

Public Resolution No. 74, 71st Cong. (S. J. 163), approved May 19, 1930:

Resolved by the Senate and House of Representatives of the United States of America in Congress Assembled, That any person duly enrolled as a member of an Indian tribe who received in pursuance of a tribal treaty or agreement with the United States an allotment of land which by the terms of said treaty or agreement was exempted from taxation, and from which land the restrictions have been removed, and who was required or permitted contrary to such stipulation to pay any illegal or unauthorized Federal tax on the rents, royalties, or other gains arising from such tax-exempt lands during the period of such exemption and who would be entitled under the law and rulings of the Treasury Department in similar Indian cases to a refund of the taxes so illegally or erroneously collected but for the fact that he failed to file a claim for such refund within the time prescribed by law, shall be allowed one year after the approval of this Act within which to file such claim, and if otherwise entitled thereto he may recover such illegal taxes in the same manner and to the same extent as if such claims for refund had been theretofore duly filed as required by law, it not being the policy of the Government to invoke or plead a statute of limitations to escape the obligations of agreements solemnly entered into with its Indian wards: Provided, however, That in the case of the death of any such person any such illegal taxes paid by him or on his account may in like manner be claimed and recovered by the person or persons who would have received such money had it constituted a part of his estate at the time of his death.